Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

NILVIO AQUINO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

ALVIN E. ENTIN
Counsel of Record
200 East Broward Boulevard
Suite 1210
Fort Lauderdale, FL 33301
(954) 761-7201

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether the opinion of the Second Circuit in this case properly construed the law of this Court in denying Petitioner's appeal concerning the materiality requirement in prosecutions for false statements under federal law?

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PETITION FOR A WRIT OF CERTIORARI

NILVIO AQUINO respectfully petitions for a writ of certiorari to review the judgment of the Second Circuit Court of Appeals for the United States.

OPINION BELOW

The opinion of the Second Circuit (App. 1-3, *infra*), is unreported.

STATEMENT OF JURISDICTION

The Second Circuit delivered its opinion on June 23, 2000. A petition for rehearing was denied on August 1, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part, that:

> No person shall be . . . deprived of life, liberty or property without due process of law.

U.S. Const. amend. V.

STATEMENT OF THE CASE

NILVIO AQUINO was charged in the United States District Court for the District of Connecticut with one count of mail fraud in violation of 18 U.S.C. §1341 and three counts of false statement in violation of 18 U.S.C. §1001. A jury convicted AQUINO on all counts. AQUINO appealed his conviction to the United States Court of Appeals for the Second Circuit arguing, inter alia, that there was insufficient evidence that the statements of AQUINO were materially false. The Second Circuit affirmed the convictions. This petition follows.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE SECOND CIRCUIT FOR THE UNITED STATES COURT OF APPEALS CONFLICTS WITH EXISTING CASE LAW REGARDING THE MATERIALITY REQUIREMENT IN PROSECUTIONS FOR FALSE STATEMENT UNDER FEDERAL LAW

AQUINO challenges his convictions for false statement under 18 U.S.C. §1001. AQUINO, a cardiologist, was a provider under the Medicare program. The Government alleged at trial that AQUINO had made false statements with respect to an inquiry by Medicare concerning treatment rendered to two of AQUINO's patients. At trial, the Government presented written affidavit made by Dr. Aquino in response to Medicare's request with respect to disputed claims regarding the doctor's prescription of certain medical tests. The Government also presented summary statements made by Dr.

AQUINO in response to Medicare's request for explanations as to the doctor's reasons for prescribing certain medical tests.

The particular test for which Medicare sought information was the trans telephonic monitoring, or, TTM. TTM is a device which is used to monitor heart patients by allowing patients to send a cardiogram from their home by telephone to their physician. The Government's evidence was that the TTM is normally employed on an unscheduled basis; that is, when a patient experiences symptoms. The Government's evidence suggested that Dr. AQUINO was scheduling the TTMs on a regular basis and billing Medicare unnecessarily.

However, the evidence presented by the Government was clear that the review conducted by Medicare only questioned the propriety of the initial ordering of the TTM, not the propriety of its subsequent use. The evidence was also clear that the patients who were the subject of the review and of Dr. AQUINO's statements, Ms. Morales and Mr. Torres, did indeed suffer from cardiac problems and were appropriate candidates for appropriate uses of the TTM. Finally, the evidence was clear that Dr. AQUINO prescribed TTM for these patients because, in his estimation, TTM was medically necessary.

The Government contended through their evidence that the Medicare review questioned the frequency of the tests prescribed and that Dr. AQUINO's responses in that regard were false. However, the evidence was clear that the review only concerned the initial ordering of the tests. In fact, in Government Exhibit LM-13, a copy of Medicare's request, Medicare stated "supply us with a narrative explaining the reason for referring the patient for

cardiac event detection." Nowhere did the request seek information regarding any subsequent treatment as a result of the initial ordering of the test. Therefore, any suggestion by the Government that Dr. AQUINO's statements were false with respect to his reasons for the frequency, or the adjusting, of the medications, was not material to Medicare's inquiry. Under 18 U.S.C. §1001, any alleged false statement must be material or a conviction for false statement cannot stand. Because the Government failed to present evidence in support of this crucial element to the charges of false statement, a judgment of acquittal should have been granted as to those counts.

Section 1001 of Title 18, United States Code provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device *a material fact*, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. (emphasis added)

Under the statute, the Government is required to prove, by sufficient evidence, that the statement, even if false, was material. As to this issue, this Court supplied a definition of materiality within the context of a violation of 18 U.S.C. §1001 opining that such a statement "must have the natural tendency to influence or [be] capable of influencing the decision of the decision-making body to which it was addressed." *United States v. Gaudin*, 515 U.S.

506 (1995). Indeed, the Second Circuit has recognized, pursuant to *Gaudin*, that materiality is an essential element of a violation of 18 U.S.C. §1001 which the Government must prove with sufficient evidence. *United States v. Ballistrea*, 101 F.3d 827 (2d Cir. 1996); *United States v. Klausner*, 80 F.3d 55 (2d Cir. 1996) and *United States v. Ali*, 68 F.3d 1468 (2d Cir. 1995). The *Klausner* court, discussing the *Gaudin* inquiry with regard to materiality, stated:

> The [*Gaudin*] Court reasoned that the decision whether the statements were material requires the determination of at least two subsidiary questions of purely historical fact: (a) "what statement was made?"; and (b) "what decision was the agency trying to make?". The ultimate question: (c) "whether the statement was material to the decision," requires applying the legal standard of materiality (quoted above) to these historical facts.

Applying the Government's evidence in this case to the above-announced standard it is clear that the Government failed to present sufficient evidence that the alleged false statements were material. As to the first prong; i.e., what statement was made, Dr. AQUINO's statements went to explaining his reasons for ordering the TTM and adjusting the TTM. However, as stated above, the Government conceded that the statements explaining the ordering of the TTM were not charged as false. In fact, the prescriptive codes used by Dr. AQUINO were all symptomatic codes. Proceeding to the next prong; i.e., what decision was the agency trying to make, the evidence at trial clearly showed that Medicare was trying to determine whether the ordering of the TTM was justified, or medically necessary *in the inception*. Finally, to sustain

a conviction as to alleged violations of 18 U.S.C. §1001, the Government must present sufficient evidence that the statement was material to the decision. As to this final prong, the Government wholly failed to do so. The requests submitted by Medicare indicated that the agency was seeking explanations as to whether there was a true cardiac condition with respect to these patients and whether there was a legitimate and medical basis for ordering the tests. The evidence submitted by the Government as to Medicare's requests do not involve the nature of the treatment; i.e., adjustments of the medically necessary tests. The information sought by Medicare involved only the propriety of the initial ordering of the tests, not the subsequent adjustments. As to any allegations or evidence of Dr. AQUINO's false statements with regard to his reasons for adjusting the tests, those statements were simply immaterial to what Medicare was seeking and the decision that they were attempting to make; specifically, was the ordering of these tests medically necessary. Without the Government presenting any evidence whatsoever as to whether Dr. AQUINO's false statements were material to Medicare's inquiry, the convictions for false statement cannot stand.

THE QUESTION PRESENTED IS IMPORTANT

The question presented in this case concerns the Government's ability to obtain a conviction in the face of insufficient evidence under the law. This Court, in no uncertain terms, has made materiality an element of the offense of false statements under 18 U.S.C. §1001. In this particular instance, the policy concerns in holding the

Government to its burden of production of sufficient evidence are great. As more and more Americans become eligible for Medicare, pressure on their doctors to prescribe the necessary medical testing and treatment becomes greater as well. Doctors will prescribe tests which they feel are medically necessary to properly treat their patients. A doctor who merely suspects a problem will be reluctant to prescribe a test lest the Government argue that the mere submission of a claim to Medicare for prescribing the test constitutes a violation of federal law. The quality of healthcare will thus diminish as doctors seek to avoid criminal prosecution. Therefore, the Government must be held to their burden of production of sufficient evidence in order to obtain a conviction and trial courts should be particularly vigilant to insure that this burden is met in each case.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

ALVIN E. ENTIN
Counsel of Record
200 East Broward Boulevard
Suite 1210
Fort Lauderdale, FL 33301
(954) 761-7201

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 23rd day of June two thousand.

Present: HONORABLE AMALYA L. KEARSE,
HONORABLE ROBERT D. SACK,
HONORABLE SONIA SOTOMAYOR,
Circuit Judges.

(Filed Jun. 23, 2000)

UNITED STATES OF AMERICA,
Appellee,
- v. -
NILVIO R. AQUINO,
Defendant-Appellant.

No. 99-1476

Appearing for Appellant: Alvin E. Entin, Entin, Margules & Della Fera, Ft. Lauderdale, Fla.

Appearing for Appellee: Maria A. Kahn, Ass't U.S. Att'y, D. Conn. New Haven, Ct.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed for the reasons stated in Judge Arterton's *Endorsement Order [Doc. #32]* dated February 10, 1999, rejecting defendant's statute-of-limitations claim, and for the reasons stated in Judge Arterton's *Ruling on Defendant's Renewed Motion for Judgment of Acquittal, or, in the Alternative, Motion for New Trial [Doc. #92-1, #92-2]* dated August 9, 1999, rejecting defendant's challenges to the sufficiency of the evidence to support his conviction, to the materiality of the false statements proven, and to the absence of a limiting instruction with respect to the admission of certain evidence.

We have considered all of defendant's contentions on this appeal and have found them to be without merit. The judgment of the district court is affirmed.

FOR THE COURT:
ROSEANN B. MacKECHNIE,
Clerk
by:
/s/ Lucille Carr

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
	:	**NO. 3:98cr153**
v.	:	**(JBA)**
NILVIO R. AQUINO	:	

RULING ON DEFENDANT'S RENEWED MOTION FOR JUDGMENT OF ACQUITTAL, OR, IN THE ALTERNATIVE, MOTION FOR NEW TRIAL [DOC. #92-1, #92-2]

Following the jury's April 27, 1999 verdict finding defendant Dr. Nilvio R. Aquino guilty on one count of mail fraud under 18 U.S.C. § 1341, and three counts of making false statements under 18 U.S.C. § 1001, defendant Nilvio R. Aquino renewed his Motion for Judgment of Acquittal pursuant to Fed. R. Crim. P. 29(c) initially made orally at the close of the government's case and, alternatively, a Motion for a New Trial pursuant to Fed. R. Crim. P. 33 [doc. #92].

Defendant Aquino contends that he is entitled to a judgment of acquittal because the evidence was insufficient to support his conviction on all four counts of the indictment with respect to the "materiality" of the false statements proven. In the alternative, defendant contends that he is entitled to a new trial because the Court erroneously admitted evidence of his alleged involvement with Cardio Technical Services, Inc. ("CTS"), or failed to give a limiting instruction regarding the use of such evidence.

BACKGROUND

Viewing the evidence in the light most favorable to the government, a rational juror could find the following facts based on the evidence adduced at trial. Dr. Aquino, a medical doctor with an active cardiology practice in Hialeah, Florida, devised with others a scheme to defraud Medicare by obtaining money and funds from Medicare by means of false pretenses and representations. The scheme or artifice alleged involved the submission of false or misleading claims to Medicare for the technical component ("TC") of transtelephonic electrocardiogram monitoring ("TTM") that were not properly reimbursable under the Medicare Program. Specifically, the scheme involved causing the submission of bills first by Cardio Technical Services, Inc. ("CTS") and then Cardio Metrics, Inc. ("CMI") to Medicare carriers that falsely represented the ICD-9 code that the TTM services provided were for symptomatic use, i.e., the claims represented that each patient was wearing the device, or had it nearby, and activated it upon experiencing a symptom, such as syncope, palpitations or dizziness, faintness, not on a scheduled day or time, when in fact, as the defendant knew, the TTM device was actually used with patients on a scheduled basis by a technician who placed the device on the patients and activated it irrespective of whether the patients were experiencing symptoms.

In February 1994, Travelers Insurance Company ("Travelers"), the Connecticut Medicare carrier,[1] initiated a review of a random sample of 100 CMI claims to determine whether any of the submitted claims were properly payable. Two TTM claims submitted by Dr. Aquino on behalf of two of his patients, Maria Morales and Victor Torres, were part of the 100 CMI claims sampled. On March 10 1994, Medicare notified Dr. Aquino by letter that it was conducting a "medical review audit." As part of this audit, Medicare requested the medical records for Morales and Torres for the past 24 months as well as a narrative explaining the reason for referring the patient(s) for a cardiac event detection" including "any symptoms, diagnoses, history, etc.". (Gov't Ex. LM-13).

Under the Medicare Part B Program, TTM services were "covered" or reimbursable when deemed "medically necessary," which as outlined in the coverage manual included the following uses:

a. To detect, characterize and document symptomatic transient arrhythmias;

b. To overcome problems in regulating antiarrhythmic drug dosages; and

c. To carry out early post hospital monitoring of patients discharged after myocardial infarcation.

(Gov't Ex. LM-5); (Gov't Ex. VL-23 at 4).

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[1] Travelers was the Connecticut Medicare carrier through January 3, 1995. Thereafter, relevant to the period covered by the indictment, MetraHealth Insurance Company ("MetraHealth") served as the Connecticut Medicare carrier. *See* Indictment at ¶ 3.

In response to this request, Dr. Aquino submitted the requested records and prepared summaries in response to Travelers' request and ongoing investigation. In the March 1993 summary reports, Dr. Aquino falsely stated and represented that during the period of transmission, medication for Maria Morales and Ramon Torres had been adjusted according to the results of the TTM when in fact their medications were not so adjusted. These false statements formed the bases for Counts Three and Four in the Indictment.

Upon reviewing the records and summaries submitted by Dr. Aquino, Travelers then notified Dr. Aquino's attorney that it had completed its "postpayment review" determining that these claims were not properly payable under the Medicare Part B Program and informed him of his right to request further review, i.e. a hearing before a Medicare Hearing Officer. (Gov't Ex. LM-14). Defendant so elected, and on May 4, 1995 submitted an affidavit to the Medical Officer responsible for determining whether the CMI claims submitted were reimbursable falsely stating and representing that the medications of his two patients Morales and Torres were adjusted based on the results of the TTM. (Gov't Ex. LM-15). Dr. Aquino also mailed a copy of this affidavit to Connecticut's new Medicare carrier, MetraHealth. This false affidavit is the basis for Count Two, and his mailing of this affidavit to MetraHealth is the operative mailing which serves as the basis for the mail fraud alleged in Count One.

MOTION FOR JUDGMENT OF ACQUITTAL
[Doc. $92-1]

LEGAL STANDARD

"In challenging the sufficiency of the evidence to support his conviction, a defendant bears a heavy burden." *U.S. v. Matthews*, 20 F.3d 538, 548 (2d Cir. 1994). In assessing a defendant's challenge to the sufficiency of the evidence supporting his conviction, the Court must view the evidence, whether direct or circumstantial, in the light most favorable to the government, crediting all inferences that could have been drawn in the government's favor. *Matthews*, 20 F.3d at 548; *United States v. Gordon*, 987 F.2d 902, 906 (2d Cir. 1993). Further, pieces of evidence must be viewed not in isolation, but in conjunction, and the conviction must be upheld where the inferences reasonably drawn from the record as a whole support a jury's conclusion that the defendant was guilty beyond a reasonable doubt. *Matthews*, 20 F.3d at 548.

In this motion for judgment of acquittal, Dr. Aquino claims "the Government has failed to present sufficient evidence that the alleged false statements were material."[2] It is undisputed that a finding of materiality was required to support Dr. Aquino's conviction on the three false statement counts. Dr. Aquino also contends that "as the alleged false statements served as the basis for Count One [mail fraud], a judgement [sic] of acquittal should be entered as to that count as well." Def. Mot. at 6.

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[2] For purposes of this motion, Dr. Aquino concedes that the statements in each of these documents were false.

In light of *United States v. Ballistrea*, 101 F.3d 827, 834 (2d Cir. 1996) (recognizing that materiality is an essential element of 18 U.S.C. § 1001 offense) and *United States v. Gaudin*, 515 U.S. 506 (1995) (establishing that determination of materiality of an alleged false statement under 18 U.S.C. § 1001 must be made by jury), the Court instructed the jury on the false statement counts, in pertinent part, as follows:

> The government must also prove beyond a reasonable doubt that the statement or representation was material. A statement is material if it could have influenced the government agency's decisions or activities. However, proof of actual reliance on the statement by the government is not required.

Jury Instruction at 49, [doc. #85].

In this motion, Dr. Aquino contends that "any allegation or evidence of Dr. Aquino's false statements with regard to his reasons for adjusting the tests . . . are simply immaterial to what Medicare was seeking and the decision they were attempting to make; specifically, was the ordering of the tests medically necessary." Def. Mot. at 5-6. Dr. Aquino reasons that Medicare's review was only to determine whether his initial ordering of the TTM was justified, and thus evidence of any falsehoods that he may have caused to be submitted to Medicare in the course of Medicare's review or administrative process on other aspects of his patients' treatment were outside the scope of Medicare's investigation, and could not support a jury finding of materiality. The government responds that because such false statements were capable of influencing Medicare's decision making as to whether such

claims were properly reimbursable under the Medicare program, the jury could reasonably have concluded that they were "material" within the meaning of 18 U.S.C. § 1001. The Court agrees.

A statement, "concealment or misrepresentation is material if it has a natural tendency to influence or was capable of influencing, the decision of the decision making body to which it was addressed." *Kungvs v. United States,* 485 U.S. 759, 770 (1988). Therefore, contrary to Dr. Aquino's contention, whether Medicare actually relied on these false statements in making its determination is not the appropriate question. The appropriate focus is "what statement is made" and "what decision was the agency trying to make?" *United States v. Klausner,* 80 F.3d 55, 59-60 (2d Cir. 1996).

Dr. Aquino's motion is premised on his narrow construction of Medicare's inquiry as only concerned with the reasons for initially ordering the TTM service, a determination which defendant contends would be unaffected by the false statements at issue. However, Medicare's inquiry was not limited to Dr. Aquino's initial reasons for ordering the testing, but encompassed whether these TTM services were reimbursable under Medicare's policy and procedures. At trial, the government presented evidence of the "covered uses" eligible for TTM reimbursement under the Medicare Part B Program. (Gov't Ex. LM-5 at 2; Gov't Ex. VL-23 at 4). One of the three reimbursable "covered uses" for TTM testing, aside from symptomatic use or early post-hospital monitoring following discharge after myocardial infarcation, was "to overcome problems in regulating antiarrhythmic drug dosage." (*Id.*) Therefore, Dr. Aquino's false statements

representing that these patients' medications were changed during or as a result of the TTM testing would be capable of influencing Medicare's determination as to whether such claim was reimbursable as a drug regulation procedure. Furthermore, the letter Medicare sent Dr. Aquino first notifying him of the medical review audit requested a narrative explaining the reason for referring the patient for cardiac detection and patient records for the last 24 months, covering the period of time before and after defendant's request for TTM testing. Thus, it is reasonably inferable that Medicare's request for patient records was made because such information pertaining to the patient's subsequent treatment was relevant to Medicare's investigation and therefore capable of influencing Medicare's payment review decision.

Finally with respect to the false statement alleged in Count Two, based on Dr. Aquino's 1995 affidavit submitted to the Medical Hearing Officer with a copy mailed to MetraHealth (Gov't Ex. LM-15), Medicare's August 10, 1994 letter to Dr. Aquino's counsel indicates that none of the claims was deemed "medically necessary" or a "medical necessity" based on a thorough review of the reports submitted by CMI or the referring physician. (Gov't Ex. LM-14). Therefore, Dr. Aquino's subsequent submission of a false statement in his affidavit stating that these two patients' medications were changed as a result of the TTM test results was capable of influencing Medicare's determination as to whether these claims were medically necessary under Medicare Part B Program. As the jury was instructed, whether or not Medicare actually relied on the false statement in making any decision was not necessary to find the defendant guilty. *See United States v.*

Greenberg, 735 F.2d 29, 31 (2d Cir. 1984) ("Where a false statement is made to a public body or its representative, materiality refers to the impact the statement may reasonably have on the ability of that agency to perform the functions assigned to it by law. The question is not what effect the statement actually had [ ]. . . . The question is rather whether the statement had the potential for an obstructive or inhibitive effect.") Given the scope of Medicare's review, Dr. Aquino's false statements were capable of affecting Medicare's determination as to whether these claims were properly reimbursable, whether or not they did.

For the foregoing reasons, from this evidence, a reasonable jury could conclude that Dr. Aquino's false statements were material – that is these falsities could affect Medicare's determination of whether these TTM claims were properly reimbursable under the Medicare Part B Program.[3]

Accordingly, Aquino's Renewed Motion for Judgment of Acquittal [92-1] is DENIED.

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[3] Since the Court finds there was sufficient evidence from which a rational juror could find the three false statements charged in Counts Two, Three and Four were material, it is unnecessary to consider Dr. Aquino's argument that if judgment of acquittal entered on all of the false statement counts, "consequently, as the statements serve as the basis for Count One, mail fraud, Count One, too, should be dismissed."

MOTION FOR A NEW TRIAL
[Doc. #92-2]

In the alternative, Dr. Aquino moves for a new trial on the grounds that the Court erroneously admitted evidence relating to Cardio Technical Services ("CTS"), and even if such evidence was properly admissible under Fed. R. Evid. 404(b), the lack of any limiting instruction necessitates a new trial under Fed. R. Crim. P. 33.

Rule 33, provides in pertinent part:

> The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice.

Motions for a new trial are not favored and should be granted only with great caution, with the Court's inquiry focussed on whether it is satisfied that competent, satisfactory and sufficient evidence in the record supports the jury's finding that the defendant is guilty beyond a reasonable doubt. *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992).

The government first contends that evidence of CTS operations was offered and admitted as direct proof of the scheme alleged in the mail fraud count and, in the alternative, that even if portions of it was only properly admitted as Rule 404(b) evidence, Dr. Aquino has waived any objection by failing to request a limiting instruction. Dr. Aquino responds that by denying his pretrial motion to strike as surplusage paragraphs 19-23 of the indictment which referred to CTS, the Court effectively ruled that such evidence was admissible at trial as "substantive evidence," thereby obviating any need for him to object

to its admissibility when such evidence was offered or to request a limiting instruction during the course of trial.

In Count One, the indictment charges that "beginning in or about January 1993 and continuing until May 1995 . . . defendant . . . devised and intended to devise a scheme and artifice to defraud Medicare, and for obtaining money and funds from Medicare by means of false and fraudulent pretenses and representations." Indictment ¶ 35. The single use of the mails charged in the indictment was the mailing of Dr. Aquino's false affidavit to MetraHealth in May 1995. Even though the scheme or artifice alleged in the indictment commenced during a time outside the five year statute of limitations, the single use of the mails charged was clearly within the statute of limitations. Thus, the statute of limitations presents no bar to evidence of acts outside the statute of limitations related to the scheme to defraud Medicare so long as the mailing charged occurs within the statute of limitations period. *See United States v. Eisen*, 974 F.2d 246 (2d Cir. 1992). The evidence of the scheme charged in Count One as carried out by Dr. Aquino through CTS as late as January 1993 and thereafter through CMI until May 1995 therefore constituted substantive evidence of the scheme or artifice.

The government's trial evidence was that such scheme was first carried out through CTS located in Pennsylvania and thereafter by CMI in Connecticut with the assistance of CLTS, a corporation established in Puerto Rico, from January 1993 through May 1995. Dr. Aquino's characterization of the evidence adduced at trial as "show[ing] that CTS ceased operation in early January

1992" (Def. Mem. at 7) is inaccurate. The evidence demonstrated that CTS performed TTN services for Dr. Aquino's patients as late as January 22, 1993, (Gov't Ex. TL-40), that CTS billing claims for such services were received by Pennsylvania Medicare on January 25, 1993 (with some portion subsequently re-submitted), (Gov't Ex. TL-20), that CTS was charged by Noble House, its billing agent, for electronic claim submissions made during January, February, March and April of 1993, (Gov't Ex. LM-5), and that Pennsylvania Medicare made payments to CTS based on these electronic claim submissions in January and as late as April of 1993. (Maniscalco Testimony; Kleman Testimony; Lewin Testimony; Gov't Ex. TL-20; Gov't Ex. TL-36; Gov't Ex. TL-40). Thus, the evidence relating to CTS was properly admissible to establish the first element of the mail fraud count, a scheme or artifice to defraud, notwithstanding the fact that operative mailing charged only pertained to claims submitted by CMI. There was ample evidence from which the jury could conclude that CTS and CMI were part of the same scheme to defraud Medicare and that termination of the CTS's operations contemporaneously with the commencement of CMI's, after transfer of CTS's assets to CMI, to maximize Medicare TTN reimbursement rates by moving operations to Connecticut after Pennsylvania dropped its rate far below Connecticut's. *See United States v. Gaggi*, 811 F.2d 47, 60 (2d Cir. 1987) (finding defendant was not entitled to a "similar acts" or "other crimes" limiting instruction where court admitted evidence of prior conviction "as direct evidence of his involvement in the larger [car-theft] conspiracy").

With respect to the admissibility of evidence relating to CTS operations prior to January 1993, the commencement date alleged, it is well established that evidence of uncharged activity is not considered "other crimes" evidence under Fed. R. Evid. 404(b) if it "arose out of the same transaction or series of transactions as the charged offense, if it is inextricably intertwined with the evidence regarding the charged offense, or if it necessary to complete the story of the crime on trial." *See United States v. Gonzalez*, 110 F.3d 936 (2d Cir. 1997) (affirming admission of evidence connecting defendant to thwarted burglary attempt as relevant to defendant's possible motive for possession of firearm and to provide crucial background evidence that gave coherence to the events that took place on night of arrest); *United States v. Towne*, 870 F.2d 880, 886 (2d Cir. 1989) (affirming admission of evidence of defendant's possession of the same firearm on days other than the date charged in indictment and district court's refusal to give requested limiting instruction finding to the extent such evidence might be considered uncharged activity, it did not constitute "other crimes" within the meaning of 404(b)). Any evidence of CTS's operations before January of 1993 was inextricably linked with the evidence regarding the scheme to defraud Medicare and necessary to explain how the complex scheme charged in the indictment operated. As such, this evidence was not 404(b) evidence such that a limiting instruction would be applied.

Moreover, to the extent the admissibility of any portion of this evidence relating to CTS's pre-January 1993 would be admissible only under Fed. R. Evid. 404(b), Dr. Aquino waived any claim to a limiting instruction by

failing to request such instruction at trial and specifically declining the Court's invitation for such a request as part of its formulation of the final instructions to the jury. Dr. Aquino may not now seek a new trial having failed to raise his claim when it could have been considered and remedied if necessary.

Dr. Aquino seeks to excuse his failure to request any limiting instruction based on an unsubstantiated interpretation of the Court's pretrial ruling on his motion to strike as surplusage those paragraphs of the indictment which alleged CTS conduct. First, the Court's ruling on the motion to strike surplusage was narrowly focused on whether these allegations should be stricken from the Indictment, not whether there was some additional evidentiary reason to exclude or limit such evidence at trial. Such a fact specific determination would be both difficult and improvident before trial and without benefit of the government's proffer or evidence. Following the approach implicitly endorsed in *United States v. Scarpa*, 913 F.2d 993, 1013 (2d Cir. 1990), the Court's pretrial ruling did not rule on the admissibility of any evidence relating to CTS, but advised the defendant that such motion could be renewed at the close of the evidence if the "government fails to offer proof of the alleged connection between the defendant and these other corporate entities." Ruling at 4. In light of the government's evidence connecting Dr. Aquino to CTS and demonstrating CTS's continued submissions of and reimbursement for claims through the first quarter of 1993, renewal of Defendant's Motion would appear to have not have enjoyed much likelihood of success but, Dr. Aquino's argument that this ruling excuses his failure to object to

the admissibility of such evidence during trial and/or to request a limiting instruction is without merit.

The Court is satisfied that competent, satisfactory and sufficient evidence in the record supports the jury's finding of the defendant's guilt on the mail fraud count and three false statement counts beyond a reasonable doubt. Accordingly, Dr. Aquino's Alternative Motion for New Trial [Doc. #92-2] is DENIED.

Conclusion

For the foregoing reasons, Dr. Aquino's Renewed Motion for Judgment of Acquittal or In the Alternative, Motion for New Trial [Doc. #92-1, #92-2] is DENIED.

IT IS SO ORDERED.

/s/ Janet Bond Arterton
Janet Bond Arterton
United States District Judge

Dated at New Haven, Connecticut: August 09, 1999

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 25th day of July two thousand.

Present:

Hon. Amalya L. Kearse

Hon. Robert D. Sack

Hon. Sonia Sotomayor

CIRCUIT JUDGES,

USA

Appellee

Docket No. 99-1476

v

Aquino

Defendant-Appellant

(Filed Jul. 25, 2000)

A petition for panel rehearing having been filed herein by Nilvio R. Aquino.

Upon consideration thereof, it is Ordered that said petition be and it hereby is **DENIED**.

FOR THE COURT
ROSEANN B. MACKENCHNIE,
Clerk

BY: /s/ Arthur M. Heller
Arthur M. Heller
Administrative Attorney